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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 307

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,

Appellant,

against

PHOENIX INDEMNITY CO.

BRIEF FOR APPELLANT.

FREDERICK H. WOOD,
Attorney for Appellant.

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The Opinions Below.

The opinion of the Court of Appeals of the State of New York (R. 6-14) is reported in 251 N. Y. 127; and the opinion of the Appellate Division (R. 21-24) in 224 App. Div. 346.

Jurisdiction of This Court.

Pursuant to paragraph 1 of Rule 12 of the Rules of this Court, and within the time required therein, the appellant filed with the clerk of this Court its printed statement disclosing the basis on which the jurisdiction of this Court to review on appeal the judgment below was invoked, and on October 28, 1929 the Court, by order

duly entered, found that probable jurisdiction had been shown.

STATEMENT.

This is an appeal from a decision of the Court of Appeals of the State of New York affirming a judgment in the sum of $1,000 in favor of respondent (plaintiff below) in an action brought under § 29 of the Workmen's Compensation Law of that State for the recovery of two payments of $500 each made by respondent to the State Treasurer as custodian of two special funds created by subsections 8 and 9 of § 15 of the same Law. Two Judges of the Court of Appeals dissented upon the ground that § 29, and particularly as construed and applied to the facts of this case, violated, the due process and equal protection clauses of the Fourteenth Amendment. These are the only questions involved on this appeal.

Analysis of the Statutes Involved.

Compensation accruing to injured employees, or to their dependents in case of death, under the Workmen's Compensation Law, is, as a general rule, required to be paid directly by the employer or his insurance carrier, and not, as in some states, out of a state fund created for the purpose.

Subsection 8 of § 15 (added in 1917, Laws of 1917, Ch. 705-§ 3) and subsection 9 of the same section* (added in 1920, Laws of 1920, Ch. 760-§ 1), however, make

*Subsections 8 and 9 of § 15 are set forth in full in the Appendix, post, at pages 32-33.

provision for additional compensation in specified exceptional cases to be paid out of two special funds, created and maintained through the payment into each of the sum of $500 "in every case of injury causing death in which there are no persons entitled to compensation". These payments are required to be made in the one case (subsection 8) by the insurance carrier; and in the other (subsection 9) by the employer, or, if insured, by his insurance carrier. The payments so required to be made were sustained by this Court in *Sheehan Company* v. *Shuler,* 265 U. S. 371, *N. Y. State Rys.* v. *Shuler,* 265 U. S. 379, as being in the nature of "occupation taxes". The judgment below was for the recovery of two such payments of $500 each, made by the respondent into said funds, for the recovery of which it brought suit under § 29 as amended.

Section 29* (Consol. Laws, Ch. 67, § 29), as originally enacted and now, provides that in the event of injury or death of a person, entitled to compensation, through the negligence or wrong of another not in the same employ, such injured employee (or, in the case of his death, his dependents) may elect whether to take compensation or to pursue his remedy against the third party wrongdoer. If he (or his dependents) elects to pursue the latter, and the amount recovered in suit or settlement equals or exceeds the compensation accruing under the Compensation Law, the person so electing disentitles himself to the receipt of compensation. If, on the other hand, the amount so recovered is less than the compensation accruing under the statute, the person entitled to the same is allowed, as

*Section 29 is set out in full in the Appendix, post, at pages 33-35.

compensation, the difference between the amount of such full compensation and the amount so recovered. If the injured employee (or his dependents) elects to take the full amount of compensation to which entitled under the Compensation Law, its acceptance operates as an assignment of the cause of action against the third party wrongdoer to the employer or insurance carrier.

The wrongful death action given by the New York laws (Decedent Estate Law, § 130, Laws 1920, Ch. 919, § 1)* is compensatory in character and requires that full compensation be made by the wrongdoer. It will be observed that under § 29 a third party wrongfully injuring or causing the death of another, protected by the Compensation Law, must in every case make full restitution for his wrong.

After the enactment of subsections 8 and 9 of § 15, and in 1922, § 29 was amended (Laws 1922, Ch. 615, § 1) so as to provide that every third party wrongfully causing the death of a person entitled to compensation should, in addition to the full liability imposed by the wrongful death statute, be liable to the deceased's employer, or to his insurance carrier, for any payments made by them or either of them into the special funds created by subsections 8 and 9 of § 15.

It will be observed that § 29 as so amended in no wise affects either the creation or maintenance of such special funds, which continue to be maintained by payments made by employers and their insurance carriers. Nor does it affect the amount of the compensation to

*Section 130 of the Decedent Estate Law is set forth in the Appendix, post, at pages 35-36.

which the surviving dependents of the deceased are entitled. Nor does it affect or diminish the statutory liability of the wrongdoer under the wrongful death act. It is in effect a statute of indemnity under which such third party wrongdoer, in addition to remaining liable in an action for compensatory damages growing out of his wrongful act, is required to indemnify the employer or his insurance carrier for payments made into these special funds.

The Facts.

One Perroth was killed, through appellant's negligence, while acting within the scope of his employment by one Anderson, who had insured himself with the respondent against liability under the Workmen's Compensation Law (R. 1-2). Perroth left surviving him a dependent, his widow, entitled to compensation on account of his death (R. 2). The administratrix of his estate brought a wrongful death action against the appellant, for the benefit of his widow, for the recovery of damages, which was settled by the appellant for the sum of $15,000 (R. 2). By the acceptance of this settlement, which exceeded the compensation to which the widow was entitled under the Compensation Law, the widow became disentitled to compensation under said Law. Thereafter, two awards for $500 each were made against and paid by the respondent under subsections 8 and 9 of § 15 of the Compensation Law, for the amount of which respondent obtained a judgment below against the appellant under § 29 (R. 2, 4).

The Effect of the Statute as Construed by the State Court and as Applied to the Facts of This Case.

Subsections 8 and 9 of § 15 provide for payments into special funds by the employer or his insurance carrier only "in case of injury causing death in which there are no persons entitled to compensation". Since a person entitled to compensation, to wit, the widow, survived, the appellant contended in the courts below that the awards paid by respondent were not authorized by the statute and that hence appellant was not responsible therefor. Both the Court of Appeals and the Appellate Division construed the statute as requiring the payment of such awards, where a surviving dependent became disentitled to compensation by the settlement of a wrongful death action for an amount equalling or exceeding the amount accruing under the Compensation Law, as well as where there was no surviving dependent entitled to compensation at the time of decedent's death (R. 8, 23-24). This interpretation, although contrary to the interpretation placed upon the Federal Employers' Liability Act by this Court in *Chicago, B. & Q. R. R. Co.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161, is, of course, binding upon this Court.

It will be observed, however, that as construed by the state court, where there is such a dependent the liability of the third party wrongdoer to indemnify the employer or the insurance carrier for payments into these special funds, in addition to making full restitution for its wrong by the payment of compensatory damages, accrues only when the compensatory damages recovered in suit or settlement equals or exceeds the com-

pensation to which the dependent would have been entitled under the Law. Under the state court's construction of § 29 and the related sections, if the amount recovered in such action had been less than such compensation, the surviving dependent would have been entitled to receive the difference as compensation. The result would then be that neither the respondent nor the employer would have been required to make any payments into the special funds under subsections 8 and 9 of § 15, and the appellant in turn would have incurred no liability under § 29. Also, if Perroth's widow had elected to take under the Compensation Law, subsections 8 and 9 of § 15 would have been inoperative, and appellant's liability would have been confined to making full restitution for its wrong in an action for compensatory damages.

As interpreted by the court below, therefore, where dependents survive, only those third party wrongdoers causing the death of the decedent are liable (1) when the dependent elects to pursue his remedy at law against the wrongdoer; and (2) when the amount recovered equals or exceeds the compensation to which such dependent would otherwise have been entitled under the Compensation Law. The liability of all other wrongdoers is limited to making full restitution for the wrong committed. And the liability of the particular wrongdoer would be similarly limited if, although equally at fault, the person killed had been one not entitled to the benefits of the Workmen's Compensation Law, or one who, so entitled, was not acting within the scope of his employment at the time, or, although the same person, if the amount recovered in settlement or judgment had been less than the compensation to which his survivors were entitled under the Compensation Law.

The Questions Presented.

(1) Does a state law, which requires a person wrongfully causing the death of another, not in his employ, to indemnify the decedent's employer or the latter's insurance carrier for payments made into a special fund created by such law, which payments have been sustained as in the nature of an occupation tax levied upon the industry, in addition to making full restitution for his wrong by way of compensatory damages, offend the due process and equal protection clauses of the Fourteenth Amendment?

(2) Does such a law so construed as to make such liability dependent upon [1] the pursuit by the survivor of his remedy at law against the wrongdoer; and [2] the recovery in such suit of an amount equalling or exceeding compensation to which such survivor would otherwise be entitled, so offend?

The Dissenting Opinion.

Judge Lehman (with whom Judge Kellogg concurred) dissented (R. 15) upon the grounds (1) that the provision in question was unrelated to the objects or purposes of the Workmen's Compensation Law and could not be sustained because of its inclusion therein, or upon the reasoning by which such acts generally have been sustained; and (2) that it could not be sustained as an exercise of legislative power to create a new cause of action, since there is lack of a reasonable basis either for the creation of such cause of action or for the classification upon which it is based.

Specification of Errors.

There follows a specification of the assigned errors to be urged by the appellant:

1 and 3. The Court of Appeals of the State of New York erred in holding constitutional that portion of Section 29, as amended, of Chapter 67 of the Consolidated Laws of the State of New York known as the Workmen's Compensation Law (Laws of 1922, Chapter 615) which reads:

> "* * * In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased. * * *"

and in not holding that said portion of said Section deprives the appellant of its property without due process of law and denies to the appellant the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States. (R. 28-29).

2 and 4. The Court of Appeals of the State of New York erred in holding constitutional, as construed by said court, that portion of Section 29, as amended, of Chapter 67 of the Consolidated Laws of the State of New York known as the Workmen's Compensation Law (Laws of 1922, Chapter 615) which reads:

> "* * * In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased. * * *"

and in not holding that said portion of said Section, as construed by said court, deprives the appellant of its property without due process of law and denies to the appellant the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States. (R. 28-29).

ARGUMENT.

I.

THIS CASE PRESENTS NONE OF THOSE CONSIDERATIONS BY REASON OF WHICH THE WORKMEN'S COMPENSATION LAWS HAVE BEEN SUSTAINED, AND THE PARTICULAR PROVISION UNDER REVIEW MAY BE SUSTAINED, IF AT ALL, ONLY AS AN EXERCISE OF THE POWER OF THE STATE TO CREATE A NEW CAUSE OF ACTION FOR A PENALTY OR DAMAGES FOR CAUSING DEATH BY NEGLIGENCE.

1. The provision under review is neither an integral nor an essential part of the Workmen's Compensation Law, nor has it any relation to its objects and purposes.

It is plain from the foregoing that neither the objects, purposes or administration of the Workmen's Compensation Law will be in the slightest degree affected whether the provision under review be sustained or not. The compensation to be received by employees or their surviving dependents remains the same in either event. The liability of the third party wrongdoer to make full restitution for his wrong remains unimpaired. In either event, appellant cannot escape liability to make full compensation for its negligence.

The requirement is that such third party wrongdoer shall in addition indemnify the employer or his insurance carrier for payments made into the special funds created by subsections 8 and 9 of § 15, out of which additional compensation is paid under the exceptional

circumstances for which those subsections make provision. But neither the creation nor maintenance of such funds is in any way affected by § 29. That section does not provide for payment into such funds by third party wrongdoers, but only that such persons shall indemnify the employer or insurance company for payments made by them. The creation of the funds and the requirement that they should be maintained by such contributions antedates by several years the provision now under review. Neither does the statute provide that, if such payments are not made by the insurance company, by reason of its insolvency, or for any other reason, the third party wrongdoer himself shall pay into the fund the amounts required to be paid by the insurance company. The absence of such a provision clearly indicates that the legislative purpose was to indemnify the insurance carrier, rather than to provide either directly or indirectly for the maintenance of the fund at the expense of the third party wrongdoer.

The statement in the majority opinion (R. 14) that "Subdivisions 8 and 9 of section 15 and section 29, construed together, and in connection with the other provisions of the Workmen's Compensation Law, are 'component parts of a single scheme' " is accurate only in the sense that they are to be found in a single statute. The provision under review is neither an integral nor essential part of the scheme of workmen's compensation. It derives no validity from its mere inclusion in a statute, the general objects and purposes of which have been upheld. It therefore becomes important to consider the basis upon which the validity of such statutes rest; and, if it appears

that there is a complete absence of those considerations by reason of which such laws have been sustained, the mere fact that this provision is to be found in such a statute becomes wholly immaterial.

2. The provision under review derives no aid from the considerations by reason of which the validity of workmen's compensation laws have been sustained. On the contrary, such considerations are persuasive that such provision is invalid.

The question presented is entirely unlike that presented in other cases in which this Court has sustained workmen's compensation laws defining the rights and obligations of employers and employees *inter sese*.

On the contrary, the reasoning by which such acts have been sustained is persuasive of the unconstitutionality of the provision in question. As pointed out in the dissenting opinion, these laws rest primarily upon the industrial relations existing between employer and employee by reason of which it is competent for a legislature to substitute a more complete and equitable system of compensation for the inadequate remedies of the common law in the form of new liabilities imposed upon the employer and to be borne ultimately by the public at large as an expense of the industry. (Dissenting opinion, R. 15.)

In some of the earlier cases, notably *N. Y. Central R. R. Co.* v. *White*, 243 U. S. 188, the court stressed the reciprocal benefits conferred upon employer and employee alike by such loss. Subsequent cases, however, make it plain that, as pointed out in the dissenting opinion, these

laws rest fundamentally upon the existence of the status of employer and employee and upon the "industrial relations" existing between them.

In *Arizona Employers' Liability Cases,* 250 U. S. 400, an act of that State whereby, as distinguished from prior cases, the employer received no compensating benefits by way of immunity from common law liability, was sustained. This statute was sustained upon the ground that in regulating the liability of employer and employed, as engaged in a common enterprise, injuries to a workman "constitute a part of the unavoidable expense of hazardous industries" and could be regarded as part of the cost of the business or common undertaking to be assumed by the employer, to whom the opportunity of reimbursement was afforded through the price of his product (p. 425). Perhaps the most complete exposition of the grounds upon which such acts have been sustained, including the philosophy of the later as well as of the earlier cases, is that to be found in the opinion of Mr. Justice Sutherland in *Cudahy* v. *Parramore,* 263 U. S. 418. In this opinion it is expressly stated that this legislation "rests upon the status" created by the relationship of employer and employee engaged in the pursuit of a common undertaking, in which one contributes capital and the other labor, and justifying the imposition of the cost of injuries to employees as a part of the cost of the common undertaking to be borne as a cost of the business.

But the status of the appellant and the deceased was not that of employer and employee. They were not engaged in a common undertaking. Nor was the appellant engaged in any common undertaking with the deceased's employer or with the respondent insurance company.

It was an entire stranger to all three. It was guilty of wrong in that it negligently caused the death of the deceased. For that it has made full restitution. It committed no wrong against either the deceased's employer or the respondent and breached no legal duty to either in causing the deceased's death.

It is said, however, in the majority opinion below, that since subsections 8 and 9 of § 15, under which awards were paid by the insurance carrier into the special funds created by those sections, have been declared constitutional, *Sheehan Company* v. *Shuler,* 265 U. S. 371, and *N. Y. State Railways* v. *Shuler,* 265 U. S. 379, the subsequent amendment of § 29, whereby the third party wrongdoer is required to indemnify the insurance carrier for such payments, must likewise be constitutional. This is a clear *non sequitur.* These cases were decided on the authority of *Mountain Timber Company* v. *Washington,* 243 U. S. 219, in which employers' contributions to such funds were sustained as being in the nature of "occupation taxes". It will scarcely be contended that indemnification of the insurance company is in the nature of an occupation tax for those in the business of wrongfully killing others, or for the privilege of continuing such occupation.

There is thus a complete absence of the social, economic and legal considerations by which the constitutionality of workmen's compensation laws has been sustained.

On the other hand, their very absence is persuasive of the conclusion that the requirement that a complete stranger should, in addition to making full compensation

for his wrong, indemnify an insurance company for payments required to be made by it under its contract of insurance, to be used to further the purposes of the Workmen's Compensation Law. Such a provision constitutes a mere arbitrary exaction, whereby the property of one person is taken for a purely private purpose for the benefit of another, to whom the party liable is a complete stranger and towards whom it has committed no breach of duty.

II.

AS AN ATTEMPTED EXERCISE OF LEGISLATIVE POWER TO CREATE NEW CAUSES OF ACTION, THE PROVISION UNDER REVIEW VIOLATES BOTH THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

1. It violates the due process clause since there is no reasonable basis for the creation of the cause of action established, which arbitrarily takes the property of one person for the private use and benefit of another.

The power to create new causes of action unknown to the common law, while broad, is not unlimited, but, like other powers, is subject to the restrictions of the Fourteenth Amendment. Within constitutional limits the state may regulate contractual relations and establish new torts. Under the police power it may impose new duties to private persons as well as to the state, and provide for the recovery of damages for their violation. In short, it may create new rights and wrongs and provide for the protection of the former and redress of the latter at the instance of the injured party. But in every such instance the recovery allowed is for breach of some positive duty to the person entitled to such recovery. This is not such a case.

The appellant committed no wrong against the respondent. It sustained no relation, contractual or otherwise, thereto. The wrong it committed was committed against the deceased and his widow. For this wrong it has discharged its liability and made full restitution. It

is difficult, if not impossible, to conceive of any category of power to which the creation of a cause of action in favor of a person, to whom defendant has breached no positive duty imposed either by statute or common law, may be referred. Yet that is precisely the effect of the provision under review.

Clearly, if the legislature should provide that, in addition to making full restitution in a wrongful death action, the party at fault should reimburse any insurance company for all payments made by it on account of such death under policies written by it, it would scarcely be contended that such a law would be valid. Yet there is no distinction in principle between these two cases.

Conceivably a state, in the exercise of its power to establish offenses and prescribe punishment therefor, could declare any person wrongfully causing the death of another to be guilty of a misdemeanor and subject to fine, to be paid to the state, in addition to being responsible civilly to the deceased's next-of-kin. This, however, is not such a statute, nor is it conceivable that the legislature could create such a penalty to accrue to a complete stranger, against whom the wrongdoer committed no breach of duty.

It is said that the statute may be sustained as the creation of a cause of action for damages suffered by the insurance company by reason of the death of the deceased through the negligence of the appellant. In support of this suggestion the Court of Appeals cites *Pizitz Company* v. *Yeldell,* 274 U. S. 112, in which a statute permitting the recovery of punitive damages in a death action was sustained. In that, as in other similar cases, the punitive damages, like the compensatory damages recoverable, are recoverable by the personal repre-

sentative of the deceased, not by a stranger. Furthermore in the instant case, as pointed out in the dissenting opinion, the payments required to be made into the special funds created by subsections 8 and 9 of § 15 are in no true sense damages. In respect of this Judge Lehman said:

> "The liability of the employer to make payments to such a fund is not in any true sense a damage flowing from the defendant's wrongful act. It is a payment in the nature of an industrial tax which the Legislature has imposed upon employers for the purpose of creating an industrial fund for the benefit of those who are part of the industry. * * * The question before us is not whether the Legislature may compel a wrongdoer to make good all damages caused by his wrongful act, but whether the Legislature may shift to the defendant the ultimate liability for the payment, in the nature of an industrial tax, imposed upon the employer." (R. 18).

It would appear to be obvious that these occupation taxes could not have been imposed upon the third party wrongdoer in the first instance. Whether, in lieu thereof, the State could have provided for the creation of special funds through the exaction of a penalty accruing to the state in all cases of wrongful death of a person entitled to the benefits of the Workmen's Compensation Law, it is unnecessary to consider. The provision under review is not of this nature, and such a provision, if valid, would obviously have to be sustained on some ground other than the levy of an occupation or industrial tax.

It would also appear to be clear that these payments, being exacted as an occupation or industrial tax (the

theory on which they were sustained by this Court), cannot consistently therewith be shifted by law to the third party wrongdoer as damages caused by him. No person may be said to suffer damage by reason of the payment of a lawful tax, whatever its nature, or upon whatever contingency its payment may be conditioned.

Nor, consistently with the theory upon which the validity of this tax has been sustained, may it be said that the employer or his insurance carrier suffered any *damage* by reason of the payment of such taxes levied as a component part of the New York Workmen's Compensation Law. By that Law reciprocal benefits are conferred both upon employers and employee. The former is relieved of his common law liability and in lieu thereof is required to make compensation in all cases whether at fault or not but in amounts less than his common law liability. The employee, on the other hand, while deprived of his common law rights, becomes entitled to receive compensation in cases where no common law liability existed.

As originally enacted, all compensation was to be paid directly by the immediate employer of the injured or deceased employee. As disclosed by *State Industrial Commission* v. *Newman,* 222 N. Y. 363 and *State Industrial Commission* v. *Edsall,* 222 N. Y. 651, and by the footnote in *Sheehan* v. *Shuler, supra* (374), the purpose of subsections 8 and 9 was to relieve such immediate employer from the burden of paying a portion of such compensation in certain exceptional cases in which it was thought unjust to him and prejudicial to the employee to impose such burden upon him alone. This was

accomplished by requiring the payment of such portion of the compensation accruing in such exceptional cases out of special funds to be created by occupation taxes levied upon the industry. Subsection 8 deals exclusively with cases where a partial disability, as, for example, the loss of a single hand, is followed by total disability caused by the loss of the other hand. Clearly the compensation to which an employee suffering such a total disability is justly entitled is more than twice that to which he is entitled for the loss of a single hand. Clearly also, a second employer, in whose employ the second hand was lost, is not responsible for the loss of more than a single hand and might not be justly called upon to assume the additional compensation arising out of the total disability. As pointed out in the cases and footnote cited, it was also found that the assumption of such liability by a second employer operated as a hindrance to the employment of persons who had already suffered a partial disability. It was to relieve these situations that subsection 8 was passed. Subsection 9 had for its purpose a similar object, namely, the rehabilitation of injured employees and the payment of additional compensation during the progress of such rehabilitation out of special funds similarly created, instead of as a charge against their immediate employers.

All employers benefited alike by being thus relieved of the making of such additional compensation in the contingencies stated. There could have been little question but that under *Mountain Timber Company* v. *Washington, supra,* these special funds could have been created by the levy of occupation taxes ratably upon all em-

ployers in the industry involved. The precise question involved *Sheehan Company* v. *Shuler, supra,* and *N. Y. State Rys.* v. *Shuler, supra,* was whether it was arbitrary and unreasonable to limit such occupation taxes to employers whose own employees die as the result of injuries sustained in the course of their employment and leave no surviving dependents and who thus escape being called upon to pay compensation. In answering this question this Court said:

> "The payments thus required are not unfair and unreasonable in amount. The aggregate for the two funds is one thousand dollars. This is much less than the maximum payment which may be required according to the scales in case the employee leaves survivors entitled to death benefits, and seems not to exceed, if it equals, the average amount of the payments required in such cases." (p. 378).

Thus it will be observed that the particular employers against whom such occupation taxes were levied, in addition to being the beneficiaries of the general scheme under which in common with all others they were relieved of the payment of all additional compensation to be paid under subsections 8 and 9, were those who, by reason of the absence of surviving dependents, had escaped the payment of any compensation growing out of the death of a person in their employ. It will also be observed that the Court found that the amount of such taxes did not exceed the average compensation which would have been otherwise payable and was much less than the maximum compensation for which such em-

ployers would otherwise have been liable. The inference is plain that if the payments exacted had exceeded such compensation they would have been held to be arbitrary and unreasonable. But under § 29 they are sought to be shifted to persons who have been relieved of no existing liability and are required to pay them *in addition to making full restitution in the shape of compensatory damages.*

The liability imposed by subsections 8 and 9, like all other liabilities imposed by the Workmen's Compensation Law, are imposed by reason of the existence of the status of employer and employee and as an exercise of the State's power to substitute for the liabilities of the common law the new liabilities imposed, to be made a charge on the industry susceptible of recoupment in the employer's price. The employer is no more damaged by being compelled to pay the occupation taxes levied by subsections 8 and 9 of § 15 than by the making of any other payment required by the Workmen's Compensation Law for which he would not be liable at common law. All payments made thereunder rest upon a common basis under a scheme of which he is a beneficiary, as well as one under which he assumes certain responsibilities, and he is no more damaged by being required under such scheme to make certain payments than by being required to make others.

As for the insurance company, its obligations grew out of its contract of insurance, under which, for a consideration, it insured the employer against all liability accruing under the Workmen's Compensation Law, including the payment of these occupation taxes. Its liability did not grow out of any wrongful act upon the

part of the appellant but out of such contract of insurance.

Finally, under the interpretation placed upon the statute by the state court, and as applied to the facts of this case, appellant's wrongful act was not even the proximate cause of the respondent's payments. Under such interpretation, these payments were required to be made not because the appellant negligently caused the death of the deceased but because the deceased's widow collected from the appellant a sum in excess of the compensation for which the insurance company would otherwise have been liable. If she had taken her full compensation, or if the amount recovered had been less than such compensation, the respondent would have been required to pay nothing into these special funds. Under the facts of this case, there is not only wanting the absence of any breach of duty to respondent, which is customarily, if not universally, the origin of legal damage, but an absence of proximate cause as well.

It is respectfully submitted that the provision under review is so arbitrary and unreasonable as to amount to a deprivation of property without due process of law and in effect transfers the property of one person to another by legislative fiat for the private use of the latter, to whom the former sustained no contractual relation and against whom it had committed no tort.

2. The provision under review violates the equal protection clause of the Fourteenth Amendment because the classification upon which it depends is arbitrary, capricious and without substantial basis.

While the legislature may resort to classification, such classification must "be reasonable"; it "must not

be arbitrary or capricious". All persons similarly situated must be treated alike and there must be "a substantial basis" for the classification adopted and the differentiation of persons created thereby. *Quaker City Cab Co.* v. *Commonwealth of Pennsylvania*, 277 U. S. 389; *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Atchison, Topeka & Santa Fe Ry.* v. *Vosburg*, 238 U. S. 56; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558-561; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369; *Barbier* v. *Connolly*, 113 U. S. 27, 31.

As said in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis, supra*, wherein a statute permitting the recovery of attorney's fees against a certain class of litigants in a certain class of cases was held bad:

> "The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. *That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.*" (p. 155). (Italics ours).

And as said by Mr. Justice Brandeis in the dissenting opinion in *Quaker City Cab Co.* v. *Commonwealth of Pennsylvania, supra*:

> " * * * the classification must rest upon a difference which is real as distinguished from one which is seeming, specious, or fanciful, *so that all actually situated similarly will be treated alike.*" (p. 406). (Italics ours.)

As an attempted exercise of the power of the State to create an additional cause of action or impose an additional liability for wrongfully causing the death of another, the provision in question clearly offends the equal protection clause as thus interpreted. Such liability is not imposed upon all persons wrongfully causing the death of another but only upon those wrongfully causing the death of another protected by the Workmen's Compensation Law. It is not imposed upon all such persons, but only when the victim is acting within the scope of his employment. It is not imposed in all such cases. On its face, it applies only to cases where such victim leaves no surviving dependents. As interpreted by the state court, it applies also to cases where dependents survive but elect to pursue their statutory right of action against the wrongdoer. So construed, however, it does not apply to all such cases but only to those in which the amount recovered in judgment or settlement equals or exceeds the compensation to which such dependents would, but for such election, have been entitled to receive.

But the wrong committed by the persons upon whom the liability is imposed is no greater than that committed by other persons wrongfully causing the death of another whose liability is confined to making full restitution under the wrongful death statute. Nor is the classi-

fication based upon any difference in circumstances under which the act in respect of which the classification is made, viz., wrongfully causing the death of another, is committed, or upon any difference in degree of fault attaching thereto. The offense or wrong of a person causing the death of another not entitled to workmen's compensation is equally as great as that of one whose victim comes under the law. The decedent was run over by one of the appellant's trains while acting in the scope of his employment. If he had been killed either through the negligence of the defendant or of some other person, while not acting within the scope of his employment, the offense would have been equally great. Certainly the degree of the injury to society is in no sense mitigated by the lack of surviving dependents. On the contrary, if dependents survive, the burden which may be cast upon society for their support is even greater. And certainly the offense or wrong committed by one causing the death of another, whose dependents collect in suit or settlement a sum less than the full amount of compensation under the Workmen's Compensation Law, is equally as great as that of another, the dependents of whose victim accept in settlement a sum equal to or exceeding such compensation. Yet, as construed by the state court, the latter person is liable and the former not.

As previously stated, the state might conceivably provide that every person wrongfully causing the death of another should be guilty of a misdemeanor and subject to fine, or to the payment of a penalty to be used for the creation of some special fund to be administered by the state. Such a law would have its foundation either in the state's interest in preserving the lives of all of its

citizens, or as a deterrent to the causing of wrongful death. But the fine or penalty imposed could not be imposed only upon white men, to the exclusion of black men, or where the victim was a black man and not a white man. Neither could it be made dependent upon the occupation in which the person killed was engaged or upon the absence of surviving dependents (in which the injury to society would actually be less than that committed by a person causing the death of one leaving dependents) and certainly not upon the amount recovered by such surviving dependents in a wrongful death action, making a wrongdoer who paid to such dependents more than a certain sum liable, but relieving another wrongdoer who paid less. The classification is purely arbitrary. It bears no relation whatever to the act in respect of which the classification is made, namely, that of wrongfully causing the death of another. It would be clearly bad in a public act, having for its purpose the protection of society at large and must be equally bad in an act, whose purpose is purely private.

Furthermore, as stated by Mr. Justice Brandeis in his dissenting opinion in *Quaker City Cab Co.* v. *Commonwealth of Pennsylvania, supra*, "the object of the classification must be the accomplishment of a purpose or the promotion of a policy which is within the permissible function of the State," and the relation to such object must be direct and not "remote or negligible". The establishment of a system of workmen's compensation is within the permissible functions of the state. But, as has been shown, the imposition of this additional liability has no direct relation to the promotion of such an object, the carrying out of which is in no wise

affected, whether this provision be held good or bad. The prevention of the destruction of human life is within the permissible functions of the state. As said by Mr. Justice Stone in *Pizitz Co.* v. *Yeldell, supra,* the state may make homicide expensive by providing for the recovery of punitive as well as compensatory damages. Such is not the object of this statute, which is merely to indemnify the employer or the insurance company. The statute sustained in the *Yeldell* case would have been clearly bad, if the recovery of punitive damages had been conditioned upon a classification similar to that now under review, and certainly so, if it had been conditioned upon the amount of compensatory damages recovered from the wrongdoer, rendering such wrongdoer liable for punitive damages only if such compensatory damages exceeded a stated sum.

There is nothing in the suggestion of the Court of Appeals (R. 14) that, since the Legislature might, but did not, make the liability of the defendant greater by imposing an additional liability in all cases of wrongful death, the appellant may not question the provision under review upon the ground that it has been denied the equal protection of the laws thereby, citing *People* v. *Braunstein,* 248 N. Y. 308, and *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571. The *Braunstein* case was a case involving the validity of acts providing for the establishment of supplementary schools in school districts over a certain size and for the compulsory attendance of minors between designated ages, both obviously proper subjects for classification. The ruling of this Court in the *Jeffrey* case, relied upon by the court below, was a ruling that an employer could not, under the equal protection clause,

complain that the statute discriminated against certain classes of employees, but only of discrimination against himself as an employer and in favor of other employers. This is not such a case. The discrimination complained of is a discrimination against some persons, wrongfully causing the death of another, in favor of others without any rational basis for such discrimination. Appellant is not complaining of a discrimination against some persons so killed, or their surviving dependents, and in favor of others.

In *Gulf, Colorado & Santa Fe Ry.* v. *Ellis, supra,* this Court, speaking of the statute under review which classified debtors, said:

> " * * * before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other." (p. 157).

The ruling made in that case is equally applicable to an attempted classification of persons wrongfully causing the death of another. In that case the statute might have been valid, if the requirement that all debtors unsuccessfully resisting the payment of debts should be required to pay an attorney's fee to the successful plaintiff, the result of which would have been to extend the liability of the appellant in that case to cases not within the purview of the statute under review. This did not prevent such appellant from successfully invoking the

equal protection clause by reason of the absence of any reasonable basis for the classification created by the statute. So here.

It is respectfully submitted that the provision in question on its face violates the equal protection clause; and if not, that, as interpreted and applied by the court below, under which, where dependents survive, the cause of action created is conditioned (1) upon the pursuit of their statutory action against the wrongdoer and (2) upon the recovery in settlement or judgment of an amount exceeding compensation accruing under the Compensation Law itself, it is clearly bad.

Respectfully submitted,

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APPENDIX.

A. New York Workmen's Compensation Law.

(1) Subsections 8 and 9 of § 15 (Consol. Laws, Ch. 67, § 15; L. 1917, Ch. 705, § 3, as amended by L. 1922, Ch. 615, § 1; L. 1920, Ch. 760, § 1, as amended by L. 1926, Ch. 261, § 1), at the time of Perroth's death, read as follows:

§ 15. Schedule in case of disability. The following schedule of compensation is hereby established:

* * * * * * * *

"8. Permanent total disability after permanent partial disability. If an employee who has previously incurred permanent partial disability through the loss of one hand one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of five hundred dollars. The state treasurer shall

be the custodian of this special fund, and the commissioner shall direct the distribution thereof.

"9. Expenses for rehabilitating injured employees. An employee, who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the state department of education is being rendered fit, to engage in a remunerative occupation, shall receive additional compensation necessary for his rehabilitation, not more than ten dollars per week of which shall be expended for maintenance. Such expense and such of the administrative expenses of the state department of education as are properly assignable to the expense of rehabilitating employees entitled to compensation as a result of injuries under this chapter, shall be paid out of a special fund created in the following manner: The employer, or if insured, his insurance carrier, shall pay into the vocational rehabilitation fund for every case of injury causing death, in which there are no persons entitled to compensation, the sum of five hundred dollars. The state treasurer shall be the custodian of this special fund. * * *"

(2) Section 29, as amended in 1922 (Consol. Laws, Ch. 67, § 29; amended by L. 1922, Ch. 615, § 1), reads (the matter added by the amendment, which is the provision under review, is in bold face type):

"§ 29. *Subrogation to remedies of employees.* If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, shall, before any suit or any award under

this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commissioner may by regulation prescribe. If such injured employee, or in case of death, his dependents, elect to take compensation under this chapter, the awarding of compensation shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person, association, corporation, or insurance carrier, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. **In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased.** Such a cause of action assigned to the state may be prosecuted or compromised by the commissioner. A compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for by this chapter shall be made

only with the written approval of the commissioner, if the deficiency of compensation would be payable from the state insurance fund and otherwise, with the written approval of the person, association, corporation, or insurance carrier liable to pay the same. Wherever an employee is killed by the negligence or wrong of another not in the same employ and the dependents of such employee entitled to compensation under this chapter are minors, such election to take compensation and the assignment of the cause of action against such other and such notice of election to pursue a remedy against such other shall be made by such minor, or shall be made on behalf of such minor by a parent of such minor, or by his or her duly appointed guardian, as the board may determine in each case."

B. New York Decedent Estate Law.

Section 130 (Consol. Laws, Ch. 13, § 130; L. 1920, Ch. 919, § 1) reads as follows:

"§ 130. *Action by executor or administrator for negligence or wrongful act or default causing death of decedent.* The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued.

Such an action must be commenced within two years after the decedent's death. When the husband, wife or next of kin, do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit."